



## INTERIOR BOARD OF INDIAN APPEALS

Estate of Sallie Fawbush

34 IBIA 254 (03/03/2000)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

ESTATE OF SALLIE FAWBUSH : Order Affirming Decision  
: as Modified  
:  
: Docket No. IBIA 99-12  
:  
: March 3, 2000

This is an appeal from an order issued on August 28, 1998, by Administrative Law Judge Richard L. Reeh in the Estate of Sallie Fawbush (Decedent). 1/ Appellants are Wanda Maxey, Ava Doty, and Rie Fawbush, Jr., three of Decedent's five children. For the reasons discussed below, the Board affirms Judge Reeh's order as modified herein.

Decedent, Comanche No. 808A1467, died on September 5, 1995, at the age of 98. During her lifetime, she executed at least six wills, the last on September 17, 1994. 2/ In the September 17, 1994, will, Decedent devised \$1.00 to each of the three Appellants. She devised her trust property to her other two children, Geneva Taptto and Ernest Fawbush; two of her grandchildren; and one great-grandchild.

Judge Reeh held hearings in Decedent's estate on July 10, 1996, and August 20, 1996. On July 11, 1997, he issued an order approving Decedent's September 17, 1994, will.

Petitions for rehearing were filed by Wanda Maxey and Ava Doty. Maxey alleged, inter alia, that Decedent lacked testamentary capacity when she executed her September 17, 1994, will; that Decedent was subjected to undue influence in the execution of that will; and that the will was not properly executed. Doty alleged that Judge Reeh had considered ex parte communications in reaching his decision.

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1/ The order is titled "Order Dismissing Petition to Reopen" but actually concerns a petition for rehearing.

2/ In addition to the Sep. 17, 1994, will, the record includes wills dated Apr. 2, 1943, Feb. 27, 1947, Apr. 29, 1975, Sept. 20, 1991, and Apr. 22, 1994.

Judge Reeh denied rehearing on August 28, 1998. He rejected Maxey's contentions concerning testamentary capacity and undue influence. With respect to Doty's allegations concerning ex parte communications, he stated that, although family members had written letters to him during the course of the proceedings, he had not considered them in rendering his decision.

With respect to execution of the will, Judge Reeh held that Dorothy Burton, a purported attesting witness, was disqualified because she was not present when Decedent signed the will and, in fact, signed the will as a witness prior to the time Decedent signed it. He continued:

Testimony established that (excluding or disqualifying Dorothy Burton as a Witness) [Decedent] signed this instrument before two people, namely A. A. Hopkins-Duke and Warren Roulain. Mr. Hopkins-Duke's signature properly appears as that of a Will Witness, and Mr. Roulain attested, as a Notary Public, that both [Decedent] and Mr. Hopkins-Duke subscribed the document in his presence.

The circumstances of this case demonstrate that [Decedent] actually signed her will before two disinterested adult persons, each of whom attested in writing on the instrument itself that she did so. The safeguards contemplated by 43 CFR 4.260 have - in these circumstances - been satisfied. [3/] The act of the Notary Public in this case was the act of a public officer whose function it was to attest or witness certain acts and to certify the same. One of Mr. Roulain's capacities, as a Notary Public, was to attest to the authenticity of signatures. He actually observed [Decedent] sign the September 17, 1994, document and was advised by her that she understood she was signing a last will and testament. His capacity as a Notary Public does not disqualify him as a "...disinterested adult witness."

Aug. 28, 1998, Order at 2.

On appeal to the Board, Appellants first argue that the September 17, 1994, will was not properly executed. They challenge both of the individuals accepted by Judge Reeh as attesting witnesses.

Appellants contend that Hopkins-Duke was not a disinterested witness because he had been convicted of a felony; admitted to obtaining the signature of the disqualified witness, Dorothy Burton, on the will prior to the time Decedent signed it; and may be distantly related to Decedent's family.

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<sup>3/</sup> 43 C.F.R. § 4.260(a) provides that an Indian will must be "executed in writing and attested by two disinterested adult witnesses."

None of these factors affect the status of Hopkins-Duke as a disinterested witness. Even a close relative of a will beneficiary may qualify as a disinterested witness. Estate of Orville Lee Kauley, 30 IBIA 116 (1996). The fact that Hopkins-Duke may be distantly related to the family is insufficient to disqualify him. Further, his conviction and his actions in obtaining Burton's signature have no bearing on the question of whether he had an interest in Decedent's estate.

Appellants do not dispute that Hopkins-Duke was present when Decedent signed her will and that he witnessed her signature. They have not shown that he had an interest in Decedent's estate. Thus they have failed to show that Judge Reeh erred in finding him to be a disinterested witness for purposes of 43 C.F.R. § 4.260.

Appellants challenge Roulain as a witness because, in their view, he lacks credibility as a notary. They contend that he signed a statement attesting that both Hopkins-Duke and Burton signed the will in his presence, even though Burton did not sign in his presence. Appellants also appear to be contending that a notary should not be substituted for an attesting witness under any circumstances. However, they do not develop this argument.

Decedent's will and a self-proving affidavit are combined in a single four-page document. 4/ The will proper ends at the middle of page 3 of the document. The self-proving affidavit begins on page 3 and ends on page 4. Roulain signed the document in two places, once at the bottom of page 3 and once on page 4 at the end of the self-proving affidavit.

Roulain's signature on page 4 appears in a space designated for a notary's signature, and is preceded by a notarial statement, most of which is typewritten. Spaces are provided in the typewritten statement for the names of witnesses. However, no witness names appear in those spaces. Instead, Decedent's name and part of the date, i.e., "Sept. 1994," are written in. 5/ The omission of the witness names may have been intentional, given that one of the witnesses was not present, or may have been inadvertent. Whichever was the case, there may well be problems with this statement as a notarial statement, because the statement lacks clarity and leaves

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4/ The document was prepared by a private attorney, who also prepared Decedent's Sept. 20, 1991, and Apr. 22, 1994, wills.

5/ The statement reads:

"SUBSCRIBED, sworn to, and acknowledged before me by the said SALLIE HAUVAH FAWBUSH [typewritten], Testatrix, and subscribed and sworn to before me by Sallie Hauvah Fawbush [handwritten] and Sept. 1994 [handwritten], witnesses, this 17th day of \_\_\_\_\_, 1994."

By contrast, the analogous statement in the self-proving affidavit for Decedent's Apr. 22, 1994, will, also notarized by Roulain, has the names of the witnesses handwritten in their proper places.

open the question of whether the witnesses actually appeared before Roulain. 6/ However, the notarial statement itself is irrelevant here because the self-proving affidavit (of which the notarial statement is a part) became surplusage once the will was contested. 7/

It was evidently not anticipated by the attorney who prepared Decedent's will that Roulain would sign on page 3, as no space for a notary's signature is provided on that page. Roulain's signature appears in the bottom margin. The date "Sept. 17, 1994," and the words "Notary Public" and "My comm. exp. 3/8/98" are also handwritten in the margin, and the notarial seal is affixed there. However, there is no notarial statement, such as appears on page 4.

Roulain also notarized Decedent's April 22, 1994, will, which is virtually identical to her September 17, 1994, will in both content and format. In that case, however, he signed only on page 4, at the end of the self-proving affidavit and in the space provided for a notary's signature. Thus, it does not appear to have been Roulain's standard practice to sign in places other than those provided for a notary's signature.

The unplanned nature of Roulain's signature on page 3 of the September 17, 1994, will and the absence of a comparable signature on the earlier will are evidence that Roulain made an unusual and on-the-spot decision to sign page 3. Page 3 contains the end of the will proper, Decedent's signature on the will, and the witness attestation clause. Thus, page 3 is the page on which a person would sign if he intended to sign as an attesting witness. On the other hand, there is no obvious reason why a notarization was called for on that page. Therefore, it appears most likely that, upon realizing that one of the attesting witnesses was missing, Roulain signed page 3 with the intent of serving as a witness to the will.

Roulain did not specifically testify that it was his intent to serve as an attesting witness. 8/ He did testify, however, that he saw Decedent sign the will. Further, in response to Judge Reeh's inquiry as to whether Decedent appeared to be thinking clearly at the time, he stated: "I didn't see nothing wrong with her, she appeared alright to me." Tr. of Aug. 20, 1996, Hearing at 81. Thus, he clearly performed the function of an attesting witness.

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6/ Contrary to Appellants' allegation, Roulain did not explicitly attest that Burton appeared before him.

7/ A self-proving affidavit is intended to take the place of witness testimony in cases where a will is uncontested. 43 C.F.R. § 4.233(a). When a will is contested, however, as in this case, the testimony of witnesses becomes necessary, and the self-proving affidavit no longer serves its intended purpose.

8/ However, he was never asked why he signed page 3 of the will. Moreover, he was called as a witness at the last minute and undoubtedly had little time to refresh his memory about the circumstances of the will execution.

The Board concludes that Judge Reeh was correct in finding Roulain to be an attesting witness for purposes of 43 C.F.R. § 4.260 but also concludes that he was unnecessarily broad in his analysis. Because there is sufficient evidence to show that Roulain intended to serve as an attesting witness, he should be accepted as an attesting witness on the basis of that intent. 9/

Appellants next argue that, in rejecting their undue influence argument, Judge Reeh failed to recognize that Decedent and Geneva Taptto were in a confidential relationship.

Appellants' argument that a confidential relationship existed is made for the first time in this appeal. The Board has a well-established practice of declining to consider issues raised for the first time on appeal. E.g., Estate of Rufus Ricker, Jr., 29 IBIA 56 (1996), and cases cited therein.

Even if the Board were to consider Appellants' new argument, it would find that argument unpersuasive. Appellants make only the barest allegations concerning the supposed confidential relationship, failing entirely to show that any of the elements necessary to establish such a relationship existed in this case. See, e.g., Estate of Ernestine Lois Ray, 33 IBIA 92 (1998), and cases cited therein.

Finally, Appellants contend that Judge Reeh erred in holding that Decedent possessed testamentary capacity on September 17, 1994. They contend that his conclusion is refuted by evidence that Decedent failed to recognize some family members in April 1994 and July 1994.

The record shows that in 1994 Decedent was 97 years old and had very poor eyesight. As Judge Reeh held, neither of these facts automatically deprived her of the ability to make a will. Aug. 28, 1998, Order at 1.

Judge Reeh summarized the relevant principles thus:

To invalidate a will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of her bounty, the extent of her property or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution [of the will]. Estate of Leona Ely, 20 IBIA 205 (1991); Estate of Johanna Small Rib, 19 IBIA 236 (1991); Estate of John S. Ramsey, 2 IBIA 237 (1974). The burden of establishing such inability is on any person who contests a will.

Id.

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9/ The Board reaches no conclusion in this case as to whether a notary may be deemed an attesting witness for purposes of 43 C.F.R. § 4.260 where there is no evidence of the notary's intent to act as a witness as well as a notary. See Kauley, supra, 30 IBIA at 120-21 n.4.

To refute Judge Reeh's finding concerning Decedent's testamentary capacity, Appellants must show that, on September 17, 1994, Decedent lacked such capacity. Even if Decedent's failure to recognize family members in April and July 1994 was caused by mental incapacity rather than poor eyesight)) a fact not established by Appellants)) that failure would still not be sufficient to overcome the testimony of the two attesting witnesses that Decedent appeared to be clear-minded on the critical date, i.e., September 17, 1994.

Appellants have failed to show error in Judge Reeh's August 28, 1998, order.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Reeh's August 28, 1998, order is affirmed, as modified to state that the acceptance of Roulain as an attesting witness is based upon evidence that he intended to serve as an attesting witness as well as a notary.

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Anita Vogt  
Administrative Judge

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge